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No. ~~1705~~

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-167

B. B. SIGELBAUM, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The findings of fact and conclusions of law of the district court (I-R. 12-16)[1] are not officially reported. The opinion of the court of appeals (Pet. App. A) is reported at 435 F.2d 1313.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1971, and a petition for rehearing

[1] "I-R." refers to the Record Appendix and "II-R." refers to the Second Supplemental Appendix in the court of appeals.

was denied on February 18, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on May 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's order pursuant to Section 7402(b) of the Internal Revenue Code that petitioner testify and produce records concerning a third party's income tax liability violated petitioner's privilege against self-incrimination.

STATEMENT

During an investigation of the income tax liability of Meyer Lansky (who is not a party in this case), respondent Bushmiaer, a special agent of the Internal Revenue Service, summoned petitioner to testify and to produce for examination "[r]ecords relating to any and all financial transactions with Meyer Lansky during 1967 and 1968" (I-R. 6-7, 13). Petitioner appeared at the summons hearing with his attorney, but refused to testify on the ground that his answers would tend to incriminate him; he did not produce any of the records or documents called for by the summons (I-R. 13-14, 23-26).

The present proceedings were brought against petitioner to enforce the summons (I-R. 1-4). The only witness at the hearing in the district court was Bushmiaer, who testified that he was only "trying to determine the correctness of Meyer Lansky's tax liability" (II-R. 16). He stated that while he was not investi-

gating petitioner and had no knowledge of the contents of his returns (II-R. 19), if he found discrepancies in those returns he would report them (II-R. 18-19).

The district court found that to ascertain the correctness of Lansky's tax returns for 1967 and 1968, it was necessary for Bushmiaer to examine the records in question and to take petitioner's testimony "to the extent called for by the summons" (I-R. 14). Since petitioner's tax liability was not and had not been under investigation by Bushmiaer (*ibid.*), the court concluded that petitioner "has failed to meet his burden that he is entitled to invoke his privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States with respect to any of the material described in the summons * * * or any of the testimony sought in that summons" (I-R. 16). Accordingly, the court ordered petitioner to produce the books, papers, and records called for by the summons and to testify concerning those records and the tax liability of Meyer Lansky for the years 1967 and 1968 (I-R. 16-19). The court of appeals affirmed *per curiam* (Pet. App. A).[2]

ARGUMENT

1. Contrary to petitioner's contention (Pet. 8-11), the decision below does not conflict with *Hoffman* v.

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[2] The court of appeals subsequently denied a petition for rehearing (Pet. App. B). On February 23, 1971, Mr. Justice Black stayed all lower court proceedings pending the timely filing and disposition of a petition for a writ of certiorari (Pet. App. C).

United States, 341 U.S. 479. Unlike *Hoffman*, where the record clearly indicated "that a responsive answer to the question * * * might be dangerous" (341 U.S. at 486-487), the facts in this case suggest that petitioner's invocation of the Fifth Amendment privilege was an afterthought. It was designed not for petitioner's protection, but to protect Lansky, whose tax liabilities were the sole subject of the pending investigation. Indeed, petitioner had previously permitted Bushmiaer to see at least some of the documents sought (see I-R. 22-26).[3] In these circumstances, the district court properly required petitioner to show that his newly found fears were genuine, rather than imaginary or contrived merely to aid Lansky. See *United States* v. *Powell*, 379 U.S. 48, 58. The enforcement of the summons by the courts below indicates a determination by those courts that, as a factual matter, petitioner failed to show a proper basis for his claim of privilege—a determination that does not warrant further review by this Court.

Petitioner attempted to make the required showing by introducing a newspaper article which alleged that the F.B.I. "bugged" petitioner's office in 1963 or 1964 (II-R. 31) and a routine notice from the Internal Revenue Service advising petitioner that he should keep more adequate books of account as required by relevant regulations (II-R. 32). That evi-

[3] In his appearance before Bushmiaer, petitioner refused to respond to Bushmiaer's question whether he had brought "the documents which you showed to me when I was in your office?" (I-R. 25). Petitioner at no time denied that he had willingly shown Bushmiaer some relevant documents.

dence was insufficient, particularly when balanced against petitioner's earlier willingness to disclose and the further fact that petitioner was not even suspected of any criminal offense.[4]

2. The court of appeals cited as authority for its *per curiam* affirmance of the district court's order its earlier decisions in *Venn* v. *United States*, 400 F. 2d 207, and *United States* v. *Roundtree*, 420 F. 2d 845. From this, petitioner fashions a two-pronged challenge to the decision below. He suggests that the reliance on *Venn* indicates that the court improperly restricted his right to assert his Fifth Amendment privilege because he was only a witness, and not the subject of the investigation (Pet. 11-12). From the reference to *Roundtree*, he concludes that the court has incorrectly limited a self-incrimination claim to proceedings with "dominant criminal overtones" (Pet. 12-14).

Petitioner's contentions do not accurately reflect the decisions in *Venn* and *Roundtree*. In those cases, the Fifth Circuit construed the government's summons power so as to preserve Fifth Amendment rights, on the basis of careful analysis and application of the relevant decisions of this Court. In *Venn*, the court substantially restricted a third-party witness summons so as to minimize the danger of self-incrimination, and added that its enforcement of the summons "constitutes no predetermination of the question

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[4] The notice concerning petitioner's personal tax records was wholly distinct from the summons, which involved only records and testimony relating to transactions with Lansky and his tax liability.

whether evidence so obtained may be admissible in a criminal prosecution." 400 F. 2d at 211, n. 7. And in *Roundtree*, the court held that "a blanket refusal to produce his [the witness'] records or to testify"—as here—is not the appropriate response, "even if the danger of self-incrimination is great." 420 F.2d at 852. The court explained (*id.*):

> Instead, he must present himself with his records for questioning, and as to each question and each record elect to raise or not to raise the defense. The district court may then determine by reviewing Roundtree's records and by considering each question whether, in each instance, the claim of self-incrimination is well-founded. * * *

In context, the court's reference in *Roundtree* to proceedings with "dominant criminal overtones" relates to the "blanket refusal" there involved.[5] Properly viewed, then, neither *Venn* nor *Roundtree* conflicts with decisions of this Court.[6] The court below did not err in relying on those cases.

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[5] The court reiterated that its enforcement of the summons was not a "predetermination of the question whether evidence so obtained may be admissible in a criminal prosecution." 420 F. 2d at 852, n. 16.

[6] In any event, the issue here is not the correctness of *Venn* or *Roundtree*. For the reasons set forth in Point 1, *supra*, the circumstances of this case fully support the decision below to enforce the summons.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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